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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

Consolidated Cases No. 501.

NAOMI WOOD,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

ALFRED F. MARTIN,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

BILTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENRIDGE TROUSERS COMPANY, and EMBASSY MANUFACTURING COMPANY, *Petitioners,*

vs.

THE GAS SERVICE COMPANY,
Respondent.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Defendant contends that under the evidence "a correct result was reached" in the trial (Deft's Br., pp. 2-11, 24).

Conceding that there was evidence to support a verdict for either party even if the Missouri law had been applied, the point is, the controlling Missouri law was *not applied* and plaintiffs were thereby precluded from recovery. Defendant's argument, that it had a meritorious defense anyhow, evades the issue.

Insofar as the defendant's brief bears at all upon the issues here, it is founded upon numerous inaccurate, misleading statements. To point out all such inaccuracies would unduly lengthen this reply, but some of those that pertain to certain fundamental facts must be dealt with.

As to Knowledge of Facts Putting on Inquiry.

No less than six times the defendant says that there was *no evidence*[1] that the defective pipe was installed as early as 1932 or 1933 (Deft's Br., pp. 4, 6, 16, 17, 21, 32), and charges that Judge Gardner erroneously stated in his dissenting opinion that "this service pipe had been in the ground for some 20 years" (Deft's Br., p. 21). There was such evidence (R. 18, 32),[2] and Judge Gardner in his dissenting opinion *properly treated as true for the purpose of the issues on appeal that evidence favorable to plaintiffs.* Defendant's charge that Judge Gardner misconstrued the

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[1]All italics ours unless otherwise noted.

[2]Sam Thixton, the then Street Commissioner of Tipton, recalled when the line was laid, and it was his best recollection that the whole line up to the meter (this included the defective line) was laid in 1932 or 1933 (R. 32). J. J. Brant believed that his company, which occupied the second floor of the building in question, had gas ever since 1933, and that it came through the meter "shown in the picture" (which was the meter to which was connected the defective line) (R. 18). The testimony of Lonnie Bell (R. 76, 77) (S. R. 22, 23), at most, did nothing more than make an issue of fact for the jury.

evidence is not supported by the record and is unfounded in fact, and defendant's argument based thereon is without validity.

The defendant now (for the first time) concedes in effect that it was liable if it refused to investigate in the face of facts and circumstances putting it on inquiry, but says that the trial court's charge "considered as a whole" repeatedly so advised the jury in words "almost identical" to plaintiffs' refused instruction and that Judge Gardner overlooked this fact (Deft's Br., pp. 15, 16, 21). The language of the charge itself refutes such assertion.

The trial court's charge plainly required actual knowledge. The references therein to "facts and circumstances" were confined to facts and circumstances *causing defendant "to take notice that said service line was leaking gas* (R. 88)." Obviously this is just another way of requiring that real knowledge of a leak be by some means brought home to the defendant. But plaintiffs had a right under the Missouri law to recover for *negligent ignorance*, that is, refusal to investigate where facts give rise to a duty to investigate.

It is difficult to believe that the defendant is serious when it says that the court's charge placed upon the defendant a duty to inquire or inspect. The trial judge did not think so. His comments show clearly that he took the view that there was no such duty, absent actual knowledge of a leak, saying there was "no duty whatsoever under the Missouri Law to inspect where there is just a likelihood of a leak" (R. 26-27, 64). Moreover, the trial judge's meaning was made clear by his after-verdict comment to the jury that the verdict was proper "because definitely there was no notice of any actual gas escaping made known to the defendant in this case." (R. 103).

The trial court's charge speaks for itself. It advised the jury there was no duty to inspect and thus deprived plaintiffs of a right of recovery based upon negligent ignorance. Defendant's belated efforts to give the charge a different meaning serve only to emphasize that (as Judge Gardner said) the charge, and the Court of Appeals decision approving it, were contrary to the "controlling state law of Missouri" (A. 15).

As to Ownership.

Five different times in its brief (pp. 26, 27, 30, 32, 35) the defendant states that the evidence established ownership of the pipe in the customer. This statement is not correct. The defendant bases such statement on the false premise that under its franchise the original gas company *was not permitted* to lay service lines beyond the curb. This false premise was stated no less than six times in defendant's brief (pp. 19, 20, 26, 31, 32), but the fallacy is nonetheless apparent. Section 1 of the franchise gave the original gas company the *right to lay lines* "*in all streets, avenues, alleys, bridges and public places*" (R. 63). The defendant never mentions Section 1, but dwells instead upon Section 4, which *requires* the Company to install lines up to the curb *free of charge* (R. 62). *Requiring* the Gas Company to install lines up to the curb free of charge does not mean it has no right or authority to install lines beyond the curb, defendant's oft-repeated statements to the contrary notwithstanding.[3]

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[3]In fact the record shows that the Company *did* install pipe beyond the curb in many instances (R. 49, 50), and while we doubt that it makes any difference *who* installed the pipe in question, there was evidence from which the jury could have found that the then company actually installed the pipe in question (R. 18-19, 32-33, 49-50).

Also misleading is the quotation (Deft's Br., p. 9) of Sec. 9, of the regulations prepared in 1931 by defendant's predecessor company in Tipton, which has to do with the duty to maintain service pipes. Neither Sec. 9, nor the other sections referred to by defendant, were read to the jury, and they have no bearing on the issues here. Furthermore, defendant's reliance thereon is unjustified because (1) the regulations show on their face that they were abrogated long before the casualty in question (S. R. 27), and (2) the Missouri law as to the duties of the parties takes precedence over the unilateral regulations of a gas company. *Gas Service Company* v. *Helmers*, 179 F.2d 101, 104. The only part of said regulations read to the jury was the part that indicated that the gas company intended that the customer should own *only* the part of the service pipe from property line to the meter (Exhibit 1, R. 61). Defendant concedes that the line in question was *outside* the property line (Deft's Br., p. 8).

Defendant also makes many inaccurate statements regarding the controlling law. For example, defendant states that in the case of *Golden* v. *National Utilities Company*, 356 Mo. 84, 201 S.W.2d 292 (said by Judge Gardner to announce the controlling law), *the evidence was "undisputed" that the gas company owned the pipe, and that it was "on the basis of such proof of ownership"* that the Missouri Supreme Court held that the gas company had a duty to inspect (Deft's Br., p. 21). On the contrary, as the most cursory reading of the Golden opinion discloses, the question of ownership did not enter into the court's decision and was not even discussed. The court held that the defendant should have inspected the pipe which caused the casualty because of the fact that other pipe of the same age in the area had been found defective.

The repeated inaccuracies in defendant's brief pertaining to fundamental matters in issue only emphasize the unsoundness of the defendant's position and the validity of Judge Gardner's charge that the Court of Appeals failed to consider the controlling Missouri authorities and, instead, accepted the rulings of the trial judge contrary thereto—thus, in effect, depriving plaintiffs of their right of review.

We respectfully submit that defendant's brief does not answer the petition, and that for the reasons given in the petition the Writ should issue.

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